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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

23 Cr. 10 (AS)

5 AVRAHAM EISENBERG,

6 Defendant.

Trial

7 -----x
8 New York, N.Y.
9 April 8, 2024
10 9:50 a.m.

11 Before:

12 HON. ARUN SUBRAMANIAN,

13 District Judge
14 -and a jury-

15 APPEARANCES

16 DAMIAN WILLIAMS,

United States Attorney for the
Southern District of New York

17 PETER J. DAVIS

18 THOMAS S. BURNETT

TIAN HUANG

Assistant United States Attorneys

19 WAYMAKER LLP

Attorneys for Defendant

20 BRIAN E. KLEIN

21 ASHLEY MARTABANO

RILEY SMITH

-and-

22 TALKIN MUCCIGROSSO & ROBERTS, LLP

23 SANFORD N. TALKIN

NOAM B. GREENSPAN

24 Also Present: Brandon Racz, FBI

Ryan Sears, Paralegal Specialist-USAO

25 Jonathan Oshinsky, Paralegal Specialist-USAO

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(Case called)

THE DEPUTY CLERK: Can the parties, starting with the government, please state their appearances for the record.

MR. DAVIS: Good morning, your Honor.

Peter Davis, Thomas Burnett and Tian Huang, for the government. And I'm joined at counsel table by Ryan Sears, Jonathan Oshinsky and Special Agent Brandon Racz. And Mr. Sears and Mr. Oshinsky are our paralegal specialists.

Thank you.

THE COURT: Good morning.

MR. KLEIN: Good morning, your Honor.

Brian Klein with Mr. Talkin, Sam Talkin, Avraham Eisenberg, Ashley Martabano from my firm, and Riley Smith and Noam Greenspan.

THE COURT: Good morning to everyone.

So there are a few matters which I just wanted to raise which I believe we can pick up after jury selection. I'll see if we can figure out what that noise is before we get started today. So just to run through a few of these issues and then I'll turn to the parties to see if anything is remaining.

So first, Mr. Eisenberg asked for an additional question to be asked relating to Israel. And so what I will do is on question 49 in the jury questionnaire, where Israel is raised, my proposal was to add: If there's anything relating

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1 to Israel or the fact that the defendant is of Israeli descent,
2 if that's accurate. That would, I think, get to the point that
3 the defense was raising. If that's not accurate, then I can
4 modify that, but that would be my proposal.

5 MR. KLEIN: Your Honor, do you want us to be heard on
6 that now?

7 THE COURT: Yes.

8 MR. KLEIN: I think, your Honor, one of the issues
9 with that is the government is putting on evidence, or intends
10 to, about Judaism and its practices. And we are concerned
11 about the unfortunate onset of a lot of antisemitism. So
12 discussing Israel, we think, is important, but we think the
13 reason why we included in our proposal a discussion of Judaism
14 was to get at that too because they can't be separate.

15 THE COURT: Why don't I just ask Israeli or Jewish
16 descent.

17 MR. KLEIN: Your Honor, that does it for us.

18 THE COURT: Okay.

19 Okay. Next, I have the evidentiary objections as well
20 as the government's responses. We'll pick that up after jury
21 selection today. One matter with respect to the 13(a)(5)
22 defense for the defense, as I understand it, at the present
23 juncture, given the Court's proposed instruction on
24 willfulness, the defense is not planning to assert the
25 affirmative defense in 13(a)(5); is that correct?

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1 MR. KLEIN: Yes, your Honor.

2 THE COURT: And it's not your position at this time
3 that -- it's not your position at all that the Sixth Amendment
4 applies to that defense, that it requires the proof to be made
5 by the jury beyond a reasonable doubt.

6 MR. KLEIN: Yes, your Honor.

7 THE COURT: Okay.

8 Next, on the issue that we raised at the conference
9 concerning USDC as a commodity, Mr. Burnett, you had mentioned
10 that at the time of the offense or beforehand, there were, in
11 fact, futures contracts for USDC. You had given a description
12 of what those were, and then there was a lot of shaking of
13 heads from the defense side.

14 So can I just have some more clarity on what it is you
15 were referring to as the contracts for future delivery in USDC.

16 MR. BURNETT: Sure, your Honor.

17 So we expect our expert will testify that there were
18 contracts for future delivery in USDC from between, I think,
19 approximately February 2022 until August 2022 that were offered
20 by an entity called Eqonex, E-Q-O-N-E-X, ended in August '22
21 because that company went out of business.

22 THE COURT: Okay. Those are contracts in USDC.

23 MR. BURNETT: It was physically settled Bitcoin USDC
24 futures.

25 THE COURT: Okay. So what does that mean?

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1 Physically --

2 MR. BURNETT: Physically settled means that at the end
3 of the contract, one side gives over Bitcoin, the other side
4 gives over USDC.

5 THE COURT: So is the futures contract, it involves
6 the pair of those cryptocurrencies.

7 MR. BURNETT: The pair, that's right.

8 THE COURT: Okay. How would that be a contract for
9 future delivery -- if the statutory definition is interest in
10 which contracts for future delivery are presently or in the
11 future dealt and the interest is USDC, how does that fit the
12 bill?

13 MR. BURNETT: Because the USDC is being dealt in the
14 future as part of the contract. One party promises to deliver
15 USDC in the future, the other party promises to deliver Bitcoin
16 in the future.

17 It's like imagine if you had a contract that said: In
18 the future, I'm going to give you corn and you're going to give
19 me gold. That would be both a gold and a corn future, because
20 both corn and gold are being in the future dealt. It's the
21 same thing with Bitcoin and USDC.

22 THE COURT: Okay.

23 What is the defense's position on that?

24 MR. GREENSPAN: Your Honor, I think the analogy at the
25 end was flawed. The proper analogy is if you were doing a

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1 contract for sheep or wheat in dollars, right. And the only
2 pairing here that USDC serves is that it's settled in USDC.
3 Even the exhibits themselves which, you know, we can show you,
4 make it clear that the futures are futures of Bitcoin. They
5 say that explicitly.

6 THE COURT: Okay. Well, look, you have the proposed
7 jury instruction on the commodity definition. At the present
8 time I don't have an application from the defense to preclude
9 that prong of the government's claim. So is the defense
10 planning to make such a motion? Because otherwise there's
11 nothing for me to really do.

12 The evidence would come in at the appropriate
13 juncture; you could make a motion. But right now I have no
14 motion. So what's the defense's plan at this point?

15 MR. GREENSPAN: That's fair, your Honor.

16 The way we envisioned it, we marked the objection to
17 the exhibits themselves. It's the only evidence that would,
18 you know, be of this. And if those exhibits were denied, then
19 our plan was to say, you know, there's no evidence of this and
20 would make a motion.

21 THE COURT: For me to understand those objections as
22 they're raised, I think I would need a letter just outlining
23 the defense's position, because I think it's a pure legal
24 question as to whether this type of futures contract would
25 satisfy the statutory definition. And I could rule on the

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1 objections on the fly, but I think that's not going to be
2 really helpful for anyone. I think it will be more helpful if
3 I have a letter that actually outlines your position, and the
4 government can certainly respond.

5 MR. GREENSPAN: That's fair. We'll put that letter
6 in.

7 THE COURT: Okay.

8 Any issues that we need to take up before jury
9 selection, Mr. Burnett or Mr. Davis?

10 MR. DAVIS: No, your Honor.

11 THE COURT: Mr. Klein, on your side?

12 MR. KLEIN: Your Honor, there's one thing is we've
13 been getting rolling exhibits and rolling demonstratives. And
14 the government did identify its three witnesses for tomorrow,
15 who are Jim Farrell; one of their purported experts Jain; and
16 someone from Mango Labs, Brian Smith or someone who was
17 involved in Mango, not sure precisely.

18 One of our issues is, your Honor, and there's a couple
19 with this, but for Brian Smith in particular, the government
20 has given us exhibit ranges for Mango, and it's dozens upon
21 dozens upon dozens upon dozens of exhibits. And we understand
22 his testimony though is only going to be 30 or 45 minutes. We
23 asked the government to let us know if they can give us some
24 exhibits that he might be trying to offer in so that we could
25 raise objections in advance. Because it's hard for us to parse

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1 out what they might possibly be, because there are just so much
2 Mango exhibits. The government has responded that that's not
3 required, they are not required to do so.

4 I understand technically they aren't required to do
5 so, but your Honor has asked us to try to raise issues in
6 advance to deal with them outside the jury. And with so many
7 Mango exhibits, we just can't get to that with him. And so I
8 would ask that the government let us know -- it could be at the
9 end of the day even, just so we could raise these issues in the
10 morning with your Honor, what those exhibits are that they are
11 going to offer in through him.

12 And then the issue with Farrell, who is from AscendEX,
13 there is a narrow range of exhibits there, so we don't have a
14 problem with that. So I'm just trying to, you know, be
15 efficient with the Court's time. There's about 12 exhibits for
16 him.

17 And then with Jain, last night we got a lot of
18 demonstratives. They initially identified some exhibits as
19 being his. And so we just need to know that we're get getting
20 the final demonstratives. I understand things could change in
21 the morning, there might be one or two, but we just want to
22 have clearly identified what are the demonstratives that they
23 are going to put in through their expert, which I think we are
24 entitled to know.

25 And then also, what are the exhibits they think they

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1 are going to offer through the expert, because that's a
2 different category of type of witness than a factual witness or
3 a lay witness.

4 THE COURT: That's fair.

5 So Mr. Burnett or Mr. Davis?

6 MR. DAVIS: Judge, may I have one moment?

7 (Counsel conferred)

8 MR. DAVIS: So, Judge, we're amenable to the
9 following. We are also of the view we want things to go
10 smoothly in front of the jury. So here's our proposal:

11 At the end of the trial day - so, for instance, like
12 at the end of the day today or so - we can highlight what we
13 expect the exhibits we'll be putting in through each witness.
14 We're obviously meeting with the witnesses even tonight and
15 we'll be doing so throughout trial.

16 So with all the caveats that you're used to me saying
17 at this point, which is things change and etc., what we'd ask
18 is that the defense also identify for us their impeachment
19 materials that they are intending on putting through to
20 impeaching our witnesses with in the same vein, that way we're
21 avoiding issues as well. So if they could do that at the same
22 time that we're doing that, that would be also helpful.

23 THE COURT: Well, let's take the first part of that.

24 So, Mr. Klein, just taking the part about the
25 government showing -- letting you know what they anticipate the

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1 exhibits to be, I think that answers your issue. You
2 understand that things may change when a witness is on the
3 stand and there may be additional exhibits that are raised.
4 But does that answer your issue?

5 MR. KLEIN: That would address our concern, your
6 Honor, yes.

7 THE COURT: Okay.

8 And then as to the demonstratives, you're not going to
9 be modifying those overnight, right?

10 MR. DAVIS: I don't think so, Judge.

11 THE COURT: Okay. So you'll have the demonstratives
12 as well. So I think that answers your two issues.

13 As to impeachment evidence, that's usually something
14 that's not disclosed in advance.

15 MR. DAVIS: Neither are the exhibit lists that we're
16 putting through our witness. So I think if we're in this idea
17 of fairness and transparency, it's only fair --

18 THE COURT: Well, no. The exhibits are disclosed.
19 And the objection is that they were disclosed, but there was
20 such a volume of them, that effectively it's no disclosure. So
21 they are asking for some -- a modified treatment in this case
22 because there were so many documents relating to only a couple
23 of witnesses, you have no idea what the disclosure is.

24 As to impeachment evidence, there is no disclosure
25 requirement and so it's a little bit different.

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1 But I'm not going to require the defense to disclose
2 their impeachment material. I think we have a good agreement
3 as to how we're going to proceed so that we can avoid these
4 issues moving forward, and the Court is here to answer any
5 objections.

6 And look, if something is used and there's clearly --
7 if there's some improper conduct -- I don't know what it would
8 be right now, but if there is, then you can raise it with the
9 Court.

10 MR. DAVIS: Of course. Thank you, Judge.

11 THE COURT: Okay.

12 Anything else, Mr. Klein?

13 MR. KLEIN: One more thing, your Honor. And this goes
14 to the openings tomorrow. We've asked the government to --
15 we've entered into a couple of stipulations with the government
16 to help the trial move more efficiently and on authentication.

17 One thing we've asked them to consider is a
18 stipulation about the date of Mr. Eisenberg's arrest, and that
19 that's when he learned about the arrest warrant and the
20 complaint against him, that it was under seal until that point.
21 And then he learned about it on December 26, 2022.

22 The government is considering that. I just want to
23 raise it because we plan to open and mention some of that. It
24 is important to us to talk about. We don't think those facts
25 are contested. The government has indicated they are

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1 considering it, and they'll let us know. We're hoping we have
2 that resolved by the end of the day.

3 THE COURT: Okay. Well, let's see if you can resolve
4 it by the end of the day; otherwise, if there's an issue to
5 raise with the Court, let me though. But it seems like if
6 you're doing what you should be, which is letting the other
7 side know what you're planning to do, so I expect if there's an
8 objection to anything you're saying, that it can be raised in
9 advance and certainly should not be raised in the middle of
10 openings, if it's an issue that's literally been talked to
11 about between the parties.

12 Okay. Anything else?

13 MR. KLEIN: Nothing from the defense, your Honor.

14 THE COURT: Okay.

15 So, Mr. Hernandez, I understand we're going to call
16 down and see if we can get our venire up here.

17 THE DEPUTY CLERK: Yes, your Honor.

18 THE COURT: So it may take a little while to get the
19 venire up here. And Mr. Hernandez, you're going to need to
20 adjust people in the courtroom.

21 Okay. So Mr. Hernandez is going to move some of you
22 around and we'll take care of that. And we'll be back shortly
23 and get started with jury selection. Thank you very much.

24 (Recess)

25 (Jury selection commenced and concluded)

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(Jury present)

THE COURT: Okay. Just everyone at ease for the next couple of minutes or so. We're going to come back.

Just to give you a little sense of what's going to happen, we're going to have you sworn in as a jury. And there are some preliminary instructions that I need to give you. I am not going to give you those at 4:45 p.m., don't worry. So we're going to swear you in. There's just some contact information that Mr. Hernandez is going to need from you in the back and you'll be excused for today.

Our start time for tomorrow will be 9 a.m., so I'll ask you to be here at 8:45 a.m.

Just some of the reminders.

We're going to have a compressed day to try to get you out each day by, at the very latest, 3 p.m., so that you can do everything else you need to. So try to bring in a breakfast. We'll have light refreshments back there in the jury room for you to enjoy. So we will have some things, but it's going to be impossible for you to get out of here with one 30-minute break and come back and take care of that. So make sure to bring lunch, bring breakfast, anything that you need. And you'll be able to use anything we have in the jury room. And we'll try to make things as comfortable for you as we can.

Mr. Hernandez here, as he has been doing all day, is your guide and he will be helping you with anything that you

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1 need. And so you can take it from there with Mr. Hernandez's
2 help.

3 Okay. So, Mr. Hernandez, are we prepared and ready to
4 swear in the jury?

5 THE DEPUTY CLERK: Yes, we are, your Honor.

6 THE COURT: All right.

7 (A jury of 12 and three alternates was impaneled and
8 sworn)

9 THE COURT: All right. So tomorrow we will start with
10 some preliminary instructions and we will proceed to opening
11 statements and the commencement of this trial.

12 For now, I will just tell you this:

13 During the trial, you are not to discuss this case
14 with anyone, nor are you permitted for anyone to discuss it
15 with you. This includes posting anything on the internet about
16 the case, whether it be on personal blogs, if those exist,
17 Facebook or Twitter, X, or Threads. Until you retire to the
18 jury room at the end of the case to deliberate, you simply are
19 not to talk about this case with anyone, including your spouse
20 or partner, family or close friends. Do not even discuss the
21 case with each other until you begin your actual deliberations
22 at the end of the trial.

23 Second, please do not while you are serving as jurors
24 in this trial have any conversations with the parties, the
25 attorneys, or any witnesses in this case, whether in the

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1 courtroom, in the hallways, in the elevators, outside, or
2 anywhere else. By this I mean not only avoid talking about the
3 case, do not talk at all even to say good morning or to
4 acknowledge any of these people. Someone seeing a jury in
5 conversation with a party lawyer or witness might think that
6 something improper was being discussed. To avoid even the
7 appearance of impropriety then, avoid any such contact or
8 conversations. So I can tell you that when the parties,
9 lawyers, or witnesses pass you in the halls without even
10 acknowledging your presence, they do not mean to be rude, they
11 are simply following my instructions.

12 Third, do not read or listen to anything outside the
13 courtroom that relates to this case in any way. Similarly, you
14 are not to allow anyone to speak to you about this case. And
15 just to put underscore, do not search about this case, don't
16 try to look up on the internet what's going on or any of the
17 things that you've heard about, any of the folks on that long
18 list, don't try to look up any of that.

19 If you are approached by anyone to speak about this
20 case, politely, but firmly, tell them that the judge has
21 directed you not to do so. And if any person seeks to contact
22 you about this case, you are required to report the incident
23 promptly to me by sending me a note to my courtroom deputy,
24 Mr. Hernandez.

25 Also, be sure that I am informed that any person that

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1 comes into this courtroom – this is a public trial, so that
2 could happen. But it's important that you let all of us know
3 if any of that happens.

4 Fifth, I know that many of you use cell phones,
5 smartphones, social media, the internet, and other tools of
6 technology. You must not use these tools to communicate
7 electronically with anyone about the case. I'm going to be
8 telling you like 100 times during the case. I apologize in
9 advance, but so much of what we do in life today is searching
10 about things on the internet to try to learn more. And for
11 this case it is important that you do not do that; that you pay
12 attention to the evidence and arguments as presented by the
13 parties here.

14 Do not form any opinion until all the evidence is in.
15 A case can only be presented step-by-step, witness-by-witness,
16 until all the evidence is before you. Keep an open mind until
17 you start your deliberations at the end of the case.

18 With that, I know I've kept you a long time, it's
19 4:50, I promised I'd get you out by 5.

20 So what Mr. Hernandez is going to do is going to join
21 you back in the jury room for just a second to get your contact
22 information. And then he's going to allow you to leave for the
23 day, while the parties and the Court discuss some matters so
24 that we can get ready for tomorrow.

25 You have the immense thanks of the Court for bearing

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1 through this very long day. And again, if any issues come up
2 and you need any help, please ask Mr. Hernandez, all right?

3 So right now I'm going to ask you to join
4 Mr. Hernandez.

5 Mr. Hernandez, is the jury room open?

6 THE DEPUTY CLERK: Yes, it is, your Honor.

7 THE COURT: Okay. So if you could -- could you just
8 lead them out there and could everyone rise for the jury.

9 (Jury not present)

10 THE COURT: Please be seated.

11 All right. Any issues that either side wants to raise
12 other than the exhibit and questioning objections that were
13 raised by the defense?

14 Mr. Burnett or Mr. Davis?

15 MR. DAVIS: No, your Honor.

16 THE COURT: Okay. So I'll turn to Mr. Klein.

17 So I've received -- anything else other than the
18 exhibit objections?

19 MR. KLEIN: No, your Honor.

20 THE COURT: Okay. So how do the parties think best to
21 handle these pending objections?

22 MR. KLEIN: Your Honor, we filed something, I don't
23 know if you saw it obviously in the middle of the voir dire,
24 about the issue of the 800 series exhibits. I understand those
25 are things related to a witness the government intends to call

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1 tomorrow. So that may be something we'd want to take up today
2 for sure. The government has indicated to us in other
3 conversations there are certain things they want to address
4 because it might affect their opening in terms of our
5 objections.

6 THE COURT: Okay. So why don't you -- well, I don't
7 have a copy of the letter just because it came in right now.
8 Do you have an actual copy that I can --

9 MR. KLEIN: Your Honor, unfortunately we forgot to
10 bring one back over here, so we don't have an extra copy.

11 THE COURT: Tell me what the nature of the objection
12 is.

13 MR. GREENSPAN: Your Honor, this is the conversation
14 we had this morning. And your Honor noted there wasn't a
15 motion on the record about the Eqonex, I believe it's
16 pronounced, whether those documents are relating to futures of
17 Bitcoin or whether they actually show there's a futures market
18 for USDC. So we put in a letter on that.

19 THE COURT: Okay. And which exhibit numbers are they?

20 MR. GREENSPAN: I believe they are 885 to 889.

21 THE COURT: Okay. Is this an issue that's going to
22 affect the openings?

23 MR. BURNETT: Not the opening, although it will affect
24 a witness, Mr. Jain, who's testifying tomorrow.

25 THE COURT: Okay. So what I'm going to do is because

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1 we don't have a copy of the letter here, is let's meet here at
2 8:30, and we'll figure it out at that time.

3 MR. BURNETT: Okay.

4 THE COURT: Putting those exhibits to the side, I have
5 reviewed the defendant's letter. Why don't we start with the
6 lines of questioning.

7 So the three lines of questioning that were raised
8 have to do with questions concerning manipulation to fact
9 witnesses, issues relating to a ransomware negotiator, and the
10 third issue has to do with a legal obligation to repay.

11 So as I understand the government's response, you are
12 not going to ask questions about any legal obligation to repay
13 to the Mango Markets' witnesses; is that correct?

14 MR. DAVIS: No legal opinion from those witnesses.

15 THE COURT: It's going to be questioning relating to
16 the operation of the system?

17 MR. DAVIS: Yes, your Honor, and what borrowing means,
18 what those obligations entail.

19 THE COURT: From a technological standpoint.

20 MR. DAVIS: Correct. What the users are agreeing to
21 do.

22 THE COURT: Not from a legal standpoint.

23 MR. DAVIS: They are not making a legal call about
24 what was legally required.

25 THE COURT: Okay. So I understand that defendant's

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1 objection was that questions were going to be asked about a
2 potential legal obligation to repay arising from those
3 transactions. As I understand it, that's not going to be
4 asked. And if it is asked, I will expect you to stand up and
5 object.

6 MR. KLEIN: Your Honor, can I add one point to that?

7 We have a concern, and I appreciate that, but that
8 they may ask questions like, Were you obligated? And it may
9 sound like -- like did the contract -- did the smart contract
10 obligate you to do something? And it may -- the way the
11 question's phrased, it may turn out that it sounds like they
12 are giving a legal opinion about something or they are
13 answering actually in a way that would interfere with that.
14 And so that's sort of the basis for our concern there.

15 It's hard to know without knowing exactly what the
16 question is, of course, and how the witness is going to answer
17 it. But that was what we were trying to front.

18 THE COURT: Okay. And can the government put any
19 additional color on the nature of the questioning? I'm not
20 asking you to say what you're going to be asking; but as I
21 understand it, there was a borrowing function on the platform.
22 And so questions are going to be asked about the borrowing
23 function. And related to that, it's just a question of so it's
24 a borrowing function; then there would be some technological
25 mechanism for repayment on that borrowing process?

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1 MR. DAVIS: Yes, your Honor.

2 For example, we could ask a witness: When the user
3 borrows from the platform on Mango Markets, what obligations
4 does that user have with respect to collateral? And then that
5 would -- they would just answer that question. That's not a
6 legal opinion; that's like how the platform works. And so
7 that's what we intend to ask and elicit. That's not a legal
8 opinion at all; that's just kind of what it means to borrow on
9 the platform.

10 THE COURT: Let me ask the defense: How are they
11 supposed to ask questions about the technological operation of
12 the platform while avoiding the objection that you're raising?
13 Because I understand the nature of the objection is that
14 because of the words being used -- and we've covered a lot of
15 ground in this area -- that there is a thin line between
16 questions that would go on the legal side to questions that are
17 just trying to probe into how the system literally operates on
18 the ground.

19 MR. KLEIN: Your Honor, we don't mind questions and we
20 don't object to questions about what happened or what did the
21 interface say. So like how did the platform look when you went
22 on the website; and did you click a button that said borrow
23 maybe. Obviously they can talk about that. It's when you use
24 words like "obligation" and did you then have an obligation to
25 do something, or did that mean you had the intent to repay,

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1 which is one of the questions they've been asking their
2 witnesses when they've been interviewing and preparing them for
3 testimony. We think that infringes upon -- it goes right to
4 our concern that it's going to sound like that's the law to the
5 jury and, you know, that's our basis of our objection. So it
6 is a fine line, your Honor, we acknowledge that. And there's
7 a -- we'll have to carefully pay attention to the questions.

8 But the way it's been described in what we've seen, we
9 have great concerns that to the jury the questions are going to
10 sound like they are asking the witness. And some of these
11 witnesses are the people who program the system or set it up or
12 may say that they helped run it. And it may sound like, well,
13 then you have this legal obligation to repay.

14 THE COURT: I think that one way to -- look, we'll
15 take the questions as they come. I'll instruct the government
16 to steer clear, to the extent possible, from these questions
17 about legal obligation.

18 For instance, you could ask questions from a
19 technological standpoint, what's happening with this particular
20 function. That way, if a witness does respond saying that
21 there was an obligation, it would be clear that that's their
22 understanding of how the system is working, as opposed to some
23 legal conclusion based on that they would now be permitted to
24 answer. But I'm not going to, at this stage, confine the types
25 of questions that you're going to ask.

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1 So I'll overrule the objection and we'll take it as it
2 comes tomorrow.

3 MR. DAVIS: That's fine, your Honor.

4 I think, look, a lot of this is wording choices that
5 we're just going to have to deal with.

6 THE COURT: So mind the wording choices so we can try
7 to avoid this. And then we'll take the questions as they come
8 and I'll hear the objections as the questions are asked. I
9 don't think there's any other way for me to handle this, unless
10 the parties see a path forward.

11 MR. KLEIN: Your Honor, there's also one on page 2 of
12 their letter motion, the government notes that it does not
13 intend to ask people about terms that are at issue in this
14 case. But actually one of their exhibits is a terms of service
15 from AscendEX, who's one of their first witnesses. And in that
16 terms of service, it has a definition of "manipulation."

17 So we're worried that they're offering into evidence
18 something that the jury could see and they might even pull up
19 on the screen and show them how AscendEX defined
20 "manipulation." And that's like a legal document, and that
21 could cause, again, the same type of confusion for the jury.
22 Because they have not heard your instructions on that yet. And
23 now they are seeing a document; and the lawyer who they are
24 going to call is going to talk about terms of service that is a
25 legal document and explain what AscendEX understood to be

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1 manipulation. I don't know if they intend to do that, but we
2 would have concerns about that coming in. They could redact
3 that in some way, but that is a concern of a specific exhibit
4 that I wanted to point out.

5 THE COURT: Okay. Well, then, you'll need to raise
6 that in the morning, because I don't have that objection before
7 me. I haven't seen that exhibit. I would need to see it and
8 have an objection made as to that exhibit, and I'll entertain
9 it.

10 MR. KLEIN: Yes, your Honor.

11 THE COURT: Mr. Burnett.

12 MR. BURNETT: Your Honor, on both this AscendEX point
13 and also the borrow point, I think what's important from the
14 government's perspective – and this goes to a theme we've kind
15 of had throughout many of these motions – is that what we're
16 trying to get at is what people expected of different actions
17 on different platforms, right.

18 So with respect to "borrow," it's important for the
19 government to establish that people who used or set up Mango
20 Markets expected that borrowing entailed a person doing certain
21 things, like maintaining certain collateral ratios, paying
22 interest, and either maintaining that and maintaining that
23 until they ultimately repay the loan. Same with respect to
24 AscendEX, which was one of the, kind of, platforms that
25 filtered into the pricing oracle that's at issue here. It's

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1 important from the government's perspective that this platform
2 had terms of service that prohibited manipulation. And that
3 set people's expectations about the types of things that would
4 filter into the price that was being set for Mango USDT.

5 So just as you're thinking about policing these
6 questions, I think it's important from the government's
7 perspective not to be confined to saying how technologically
8 does this operate.

9 THE COURT: That's fair. And so I think you've given
10 some useful guidance there, which is if you're talking about
11 expectations, then the questions can be framed at those
12 expectations.

13 I think the objection was really to questions that
14 were asking about obligations, which I think is a loaded term.

15 So again, these are the same type of word terminology
16 issues that we've addressed before. But I think that if you
17 were asking questions about expectations of the people who are
18 running the system, that can be potentially inbound in the way
19 that questions about legal obligations or obligations might
20 raise some concerns.

21 MR. BURNETT: Thank you, your Honor.

22 THE COURT: Okay.

23 All right. And then we'll take up the exhibit – which
24 I haven't seen – when there's an objection that's been raised
25 and I have a copy of the exhibit.

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1 As to the other points, what is the relevance of any
2 questioning to Mr. Durairaj concerning the hostage negotiator
3 or ransomware negotiator? It's unclear to me what that goes
4 to.

5 MR. DAVIS: I think two points on this, and we
6 outlined it in our letter.

7 One, it goes to his mental state during the time when
8 he was negotiating after the attack.

9 THE COURT: Whose mental state?

10 MR. DAVIS: The witness, Mr. Durairaj.

11 THE COURT: Why is that relevant?

12 MR. DAVIS: Because Mr. Durairaj is going to be
13 explaining to the jury why he is speaking a certain way with
14 Mr. Eisenberg, why he is agreeing to certain terms with
15 Mr. Eisenberg. And important context for that is that
16 Mr. Durairaj believed that Mr. Eisenberg could at any point
17 turn off -- you know, stop communicating and run off with \$100
18 million. And so looking at his actions and words during that
19 time period, it's important for the jury to understand
20 Mr. Durairaj is viewing this as such a serious situation with
21 no leverage, that he's consulting with a ransomware negotiator.

22 And -- sorry, Judge.

23 THE COURT: No, no, please continue.

24 MR. DAVIS: To the extent that defense counsel is
25 going to cross-examine him on how Mr. Durairaj was speaking

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1 about Mr. Eisenberg or trying to appease Mr. Eisenberg in the
2 days after the attack, I think it's important for the
3 government to meet that with the true fact that Mr. Durairaj
4 did not view this as an arm's-length negotiation.

5 And to the extent that the defense is going to stand
6 up and say this settlement that happened was an arm's-length
7 settlement, and that this is just some dispute between two
8 parties, I think the government should be in a position to
9 dispute that and say, Look, here's one piece of evidence that
10 shows that's not how Mr. Durairaj viewed it at all.

11 THE COURT: Okay. I'm going to sustain the objection
12 as to questioning on the ransomware negotiator or eliciting
13 that testimony.

14 However, for the reasons that you've addressed, it may
15 be that on cross-examination, if there is a suggestion that
16 Mr. Durairaj negotiated this in an arm's-length transaction,
17 that on redirect he'd be able to establish that he had
18 counseling from a ransomware negotiator, and that was the
19 situation that he was in.

20 MR. DAVIS: Understood, your Honor.

21 Similarly on opening, if the defense opens on this
22 being an arm's-length negotiation, I think that would open the
23 door as well.

24 THE COURT: I think that's -- hold on.

25 I think this is a subject that is going to be out on

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1 openings. You can address it with Mr. Durairaj. You can
2 certainly -- see, here's the thing: You can certainly express
3 that Mango Markets felt that they were under siege; they were
4 in a situation that was a crisis situation; they didn't know
5 what to do. All of those things, all of the advice that was
6 given by the negotiator can be something that's expressed
7 without mentioning the ransomware negotiator, hostage
8 negotiator, whatever you call it. That's where the prejudicial
9 impact is from. I don't believe that that needs to be elicited
10 unless the door is open on cross-examination.

11 So it's not going to be something that's going to come
12 out in openings. And we'll see on cross-examination if they've
13 opened the door wide enough for you to introduce that
14 testimony. For instance, if Mr. Durairaj were to say, No, I
15 was really -- I was in a crisis situation. I didn't know what
16 to do. And they're hammering him on cross-examination or using
17 impeachment exhibits to show that no, it wasn't that bad, that
18 would seem to be a situation where, you know, despite the
19 prejudice, they've opened the door for the government to raise
20 issues on the ransomware negotiation.

21 All right. That leaves the manipulation issue on the
22 questioning.

23 Okay. So I think we've been down this road before.

24 So the question really here is what kind of questions
25 are you going to be asking witnesses about manipulation in that

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1 sense?

2 MR. DAVIS: Judge, I can speak for certain witnesses.
3 I want to think carefully. I don't anticipate asking questions
4 about manipulation or asking for witnesses to take a view on
5 whether the conduct constituted manipulation.

6 I think what we're concerned about is when certain
7 witnesses are speaking about this incident and asked about it,
8 they slip into describing it in the ordinary way they would
9 describe this conduct, which is as manipulative or something
10 like that. And I think that's a fair characterization of what
11 their viewpoint is. And so we're not trying to ask for a legal
12 opinion on manipulation.

13 THE COURT: I understand the concern. You're not
14 going to be asking questions about a term that, as we've gone
15 back and forth, is a term of art that has all sorts of other
16 terms that courts have used to describe it in terms of the
17 legal definition.

18 Your point is there might be a witness who just lapses
19 into using that term. If that happens, then the defense can
20 ask for an instruction where I can instruct the jury that
21 manipulation in this context is a term that I will define for
22 the jury. And while witnesses may have referred to something
23 as manipulative, they are to pay attention to my definition and
24 not any label that a witness applies to it. And I will take
25 that objection if it is made. But let's try to avoid that by

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1 focusing on what's happening on the ground.

2 For instance, you can certainly ask questions about
3 the underlying factual questions that undergird manipulation.
4 And we've gone back and forth on what those things are. But I
5 understand the concern. You can't prevent a witness from just
6 using that term at some point because it's a widely used term.

7 MR. DAVIS: Your Honor, this isn't in the category of
8 just we're not trying to do that. But if it happens, we wanted
9 to at least alert the Court to it. And I think the way the
10 Court has approached this makes sense for the government.

11 THE COURT: Okay.

12 Anything else from the defense on this issue?

13 MR. KLEIN: Your Honor, no. But this is likely to
14 come up tomorrow when they call Jim Farrell, who is the
15 AscendEX general counsel, who, my understanding is, they are
16 going to ask questions that could elicit that. And we'll just
17 monitor it very closely. That goes to the terms of service I
18 was mentioning, which is Exhibit 1512, which we will bring
19 tomorrow morning and show your Honor and be ready to discuss.

20 THE COURT: Okay.

21 Mr. Burnett.

22 MR. BURNETT: I can speak to that, because I've spoken
23 with Mr. Farrell to try and navigate around this issue.

24 So right now what we're planning to do is Mr. Farrell
25 at one point in his direct examination, we'll put in the terms

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1 of service and identify the stay covered manipulation.

2 Mr. Farrell will then go talk about some other subjects and
3 ultimately will come back to the day of the attack.

4 Mr. Farrell will describe what he saw the day of the
5 attack. And we've instructed him not to use terms like
6 "artificial" or "manipulation" in the context of what he saw on
7 the day of the attack. He'll say they froze the account. He
8 won't say the reason why they froze the account. And then
9 he'll say that several weeks later, Mr. Eisenberg came forward
10 and claimed that he was the owner of that account.

11 So I think it's necessary for the story and for this
12 expectation point that the terms of service come in, and that
13 Mr. Farrell be able to describe factually what he saw and what
14 they did. But we've been careful to instruct him to navigate
15 around like saying these terms or saying, We froze the account
16 because of this particular provision in the terms of service.

17 THE COURT: You're not going to be asking him, Okay,
18 well, this terms of service has manipulation in it. Well, what
19 does that mean? What does that prevent? And does it apply
20 here? You're not going to be asking --

21 MR. BURNETT: The plan was to put it up on the screen
22 and have him basically read the three sentences that define
23 "manipulation" in the terms of service, but not give any, like,
24 characterization of it beyond what the terms of service say.

25 THE COURT: Okay. So if once you've offered it and

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1 it's been admitted into evidence, you'll have him read just
2 what it says, and then you'll move on to the other matters that
3 you are addressing.

4 MR. BURNETT: Right. Because from our perspective,
5 what's relevant is that this was something that was up on the
6 platform for other people who use the platform and for people
7 who relied on that platform in the oracle to see. So what the
8 words are is relevant, not what his interpretation is.

9 (Continued on next page)

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1 THE COURT: But you're not going to be asking
2 Mr. Farrell what his view of manipulation is, whether
3 Mr. Eisenberg's conduct counts as manipulation, anything along
4 those lines?

5 MR. BURNETT: No.

6 THE COURT: So I'll turn to the defense. That seems
7 to steer clear of the type of issue that you raised in your
8 objection. I understand you have an objection to the exhibit
9 coming in. We will hear that in the morning. Any further
10 issues to address along these lines?

11 MR. KLEIN: No, your Honor.

12 THE COURT: So then let's turn to some of the
13 exhibits. I'm going to run through these and then the parties
14 can focus on any particular one that they want to. Basically
15 the dividing line here, there are certain exhibits that appear
16 to relate to other incidents, potential unlawful conduct or
17 affairs, and there are ones that are plausibly related to this
18 incident and Mr. Eisenberg's potential intent in the days,
19 months, weeks before the incident, and that's the line that the
20 Court sees. And so, I'll give you these rulings, but I'm happy
21 to hear the parties, whether it's today or in the morning
22 tomorrow or any other appropriate juncture if there are any
23 issues here.

24 So on GX 101, the objection is sustained on 402, 403,
25 and 404(b) grounds.

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1 On 102, the objection is sustained for the same
2 reason.

3 On 103, 104, and 403, the objection is sustained.

4 Now, as to 105, 106, 300, 301, 310, 800, 800A, 801,
5 801A, 802, and 802A, and you're going to have to check me to
6 make sure I got those numbers right, these seem to -- I want to
7 hear if there's any particular ones that the defense feels
8 strongly about, I want to hear a proffer of relevance from the
9 government. But as to these particular exhibits, they seem to
10 go to not Mr. Eisenberg's knowledge of the law and what conduct
11 either falls under the law or falls outside of it. So even if
12 it's not strictly speaking the particulars of the offense at
13 issue, it would seem to be relevant, especially given the high
14 standard of willfulness that the defense has argued for, and
15 which the Court in its proposed jury charge was prepared to
16 essentially adopt in terms of Count One.

17 So, let me stop there and get any reactions from the
18 parties, because I know that was a lot of exhibits there.

19 MR. BURNETT: So I can keep track, can you go through
20 a little more slowly the numbers you read off. I was trying to
21 write, but I lost track.

22 THE COURT: Absolutely. 105, 106, 300, 301, 310, 800,
23 800A, 801, 801A, 802, and 802A.

24 MR. BURNETT: Which ones were the sustained
25 objections?

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1 THE COURT: 101, 102, 103, 104, and 403.

2 I think what makes sense, because there were a lot of
3 exhibits that were in the defendant's letter, so it may make
4 sense for me to run through these. In the morning, if there
5 are particular ones you want to focus in on, then we can do it.
6 There's going to be a lot of these that neither side has an
7 issue with. And so, we'll have a focused number of these
8 exhibits that we can run through. If we don't get through it
9 in the morning, I'm not sure a lot of these are going to be
10 day-one exhibits. We can pick it up at the end of the day
11 tomorrow or the following day. So let me give you the
12 remaining issues here.

13 GX 107 and 113. My understanding is that there's no
14 ruling requested. The defense was just flagging a potential
15 Rule of Completeness issue that the parties are still
16 discussing. So no issue there.

17 GX 108, I'm reserving decision on these. There was
18 some reference to a Rule of Completeness issue based on a later
19 occurring text that would provide clarity to the situation, but
20 I don't think the Court was furnished with those texts. So as
21 to 108, if the defense wants to provide those remaining texts,
22 then we can evaluate the Rule of Completeness objection.

23 On 109, that objection is sustained.

24 On 111, that objection is sustained.

25 MR. BURNETT: Sorry, your Honor. So 109, my

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1 understanding was it wasn't even an objection. It was just a
2 completeness argument.

3 THE COURT: Right. I have to look at that exhibit.
4 Have things been worked out as to Government Exhibit
5 109.

6 MR. BURNETT: I apologize. When you say "sustained as
7 to 109," you mean that that Tweet would come in as part of
8 completing?

9 THE COURT: Yes.

10 MR. BURNETT: Okay.

11 THE COURT: 111 is sustained.

12 114 is sustained.

13 115, I believe the parties are discussing a
14 stipulation here. This concerns whether Mr. Eisenberg was the
15 owner of a particular wallet and the parties were discussing a
16 stipulation. Has that been resolved?

17 MR. KLEIN: Not yet, your Honor. We brought it up. I
18 think we are waiting to hear back from the government. We will
19 follow up this evening on the ones we are hopefully trying to
20 reach a resolution without the Court.

21 MS. MARTABANO: I believe the government provided new
22 versions of 115 late last night and we haven't had a chance to
23 look at those and discuss a stipulation.

24 THE COURT: We'll reserve on 115.

25 On 116 and 201, that's reserved pending a stipulation

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1 on the email address.

2 313, no ruling is requested. It's my understanding
3 there's an issue with authenticity and potentially a Rule of
4 Completeness issue, but nothing that's been raised that's ripe
5 for the Court to decide.

6 No ruling has been requested as to 400, 501, or 502.

7 No ruling has been requested as to 401 and 404.

8 Again, most of these are Rule of Completeness issues where the
9 parties are still discussing.

10 Exhibit 405 is overruled.

11 Exhibit 502A is overruled.

12 Exhibit 609 and 609A are overruled.

13 The 700 series, no ruling has been requested, but some
14 issues may come up.

15 And as to 820, this is sustained. I believe this is
16 the Waves complaint. So while there may be documents that were
17 in Mr. Eisenberg's possession concerning the underlying Waves
18 issues which might be relevant to intent, I don't believe that
19 the Waves complaint, which was drafted by lawyers and would
20 raise a host of additional issues would come in. There's a
21 bunch of prejudice that is possibly raised by possibly bringing
22 that in. The probative value is limited by the fact that it's
23 a lawyer-driven document. So I'll sustain that objection.

24 As to 860, this is the podcast clip. The objection is
25 sustained.

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1 We've dealt with the government questioning.

2 So I've run through those, but we haven't really dug
3 deep into the substance. So what I'll ask the parties to do is
4 figure out which of those exhibits they want to focus on, I'll
5 have them up here on my screen so that we can run through them
6 in the morning. Then there may be some of these that the
7 parties will kind of live with the Court's ruling. For
8 instance, on the podcast clip, I am unlikely to be changing my
9 determination on the podcast clip, but as to some of these
10 other ones, if you can raise them in the morning, we can run
11 through them. I'm happy to run through especially critical
12 ones at this time if they're going to bear on openings, and we
13 can certainly do that, but it might be more efficient for the
14 parties to say I got these five we ran through yesterday and we
15 would like to run through them quickly in the morning. It
16 might just be a more efficient use of everyone's time. But
17 Mr. Burnett.

18 MR. BURNETT: One clarification. The Waves complaint
19 one, there was kind of a cross-reference in the chart to both
20 the Waves complaint, which was 820, but then there was a Google
21 document that Mr. Eisenberg kind of himself wrote that's
22 related to the Waves complaint.

23 THE COURT: I'm pretty sure I overruled that
24 objection. I believe --

25 MR. BURNETT: Sorry.

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1 MS. MARTABANO: It's 609, 609A.

2 MR. BURNETT: Sorry. Got my numbers out of order. So
3 understood on that.

4 Let me talk with folks here quickly to make sure
5 there's nothing else I need to bring up here now.

6 MS. MARTABANO: Your Honor, we do have copies of our
7 proposed supplements for 108, 401, and 404, if the Court would
8 like them now or we can email them. We have physical copies
9 for you and the government.

10 THE COURT: Why don't you email them so we don't end
11 up losing them on the way to chambers.

12 MR. BURNETT: I guess maybe one question about the
13 thought process behind 114, which might help us. So 114, I
14 think as the version of it that went to you was a lengthy chat
15 because it was the full chat between Mr. Eisenberg and this
16 person named Dmitriy. There is a narrower portion of that
17 exhibit we could offer where I think it covers all the portions
18 that show Mr. Eisenberg obtaining this bochen.clean@gmail
19 account that does not get into some of the sanctions issues
20 that appear elsewhere in the chat. Was the sanctions issue
21 kind of animating the Court's concern?

22 MR. TALKIN: Judge, I think we're confusing exhibits
23 here. I think that's 116 that we're working on stripping out
24 that issue.

25 THE COURT: I thought 114 had to do with let's rob

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1 a --

2 MR. BURNETT: Sorry. I apologize. I meant 116.

3 MR. TALKIN: 116 we're still trying to resolve.

4 MR. BURNETT: This is a good sign I should come back
5 with stuff in the morning.

6 THE COURT: Anything from either side before we -- and
7 we'll take these issues up at 8:30 in the morning.

8 MR. KLEIN: Your Honor, we'd ask our client be
9 permitted to have some snacks that we brought. The marshals
10 need your permission.

11 THE COURT: So ordered. If you need a written order
12 or anything else, we'll be happy to get it for you.

13 THE MARSHAL: Thank you, your Honor.

14 MR. DAVIS: Judge, if I may, just so I understand the
15 Court's ruling on this hostage ransomware point. The way I
16 understand, this doesn't affect openings. Basically, the door
17 opening analysis would only happen if, on cross examination of
18 Mr. Durairaj, the defense opens the door?

19 THE COURT: Yes.

20 MR. DAVIS: Understood.

21 THE DEPUTY CLERK: The Court is having issues
22 accessing the 3500 materials that were submitted on the USAFX.
23 It seems to be an issue not with the documents themselves, but
24 the Court is having trouble accessing, actually getting into
25 the account, despite having the username and password already

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1 set up. I'm not sure if the government has any alternate
2 proposals of a way we can deal with that.

3 MR. DAVIS: We can try to put it on the drive. With
4 USAFX, is it a problem on our end?

5 THE DEPUTY CLERK: It seems to be a login issue, that
6 we're having trouble resolving that problem.

7 MR. DAVIS: We can try to fix this issue. We can also
8 get a drive for the Court.

9 THE COURT: Let's get a drive and take care of it that
10 way.

11 Any further issues to address before we adjourn?
12 Mr. Davis?

13 MR. DAVIS: Nothing for now, Judge. Thank you.

14 THE COURT: By the way, I think we had it right on the
15 math. I didn't want to raise it. Even Ms. Goldberg is like,
16 don't raise it, but it bothered me.

17 MR. DAVIS: It's certainly fair to raise.

18 THE COURT: Because I think if 29 takes you to 35,
19 that is seven. But we did it the old fashioned way. Still
20 managed it.

21 MR. DAVIS: That's fine. I deserve it.

22 THE COURT: No one's fault. It was bothering me. I
23 sat there and done that elementary grade math a hundred times
24 and it came out the same way. I wanted to make sure I wasn't
25 missing something.

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1 Thank you everyone for your great work today. I
2 really appreciate it. We'll see everyone back here tomorrow at
3 8:30 a.m.

4 (Adjourned to April 9, 2024 at 8:30 a.m.)

5 * * *